



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2004

Ms. Hadassah Schloss
Open Records Administrator
Texas Building and Procurement Commission
P.O. Box 13047
Austin, Texas 78711

OR2004-3099

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199614.

The Texas Building and Procurement Commission (the "commission") received a request for (1) the proposals submitted by PSI Examination Services ("PSI") and Prometric, Inc. ("Prometric") in response to RFP No. 450-4-3 for Examination Administration Services and (2) all bid evaluation and tabulation materials. You inform us that the commission has released the bid evaluation and tabulation materials. You take no position with regard to the public availability of the rest of the requested information. You believe, however, that the request for that information implicates the proprietary interests of PSI and Prometric. You have submitted the requested proposals. You also notified PSI and Prometric of this request for information and of the parties' right to submit arguments to this office as to why their proposals should not be released.¹ We also received correspondence from attorneys for PSI and Prometric. We have considered all of the submitted arguments and have reviewed the submitted information.

Initially, we address Prometric's statements that information contained in its proposal is subject to non-disclosure agreements and other precautions against public access. We note that information is not confidential under the Public Information Act (the "Act"), chapter 552

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

of the Government Code, simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless information contained in Prometric’s proposal comes within an exception to disclosure, the information must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no

one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude, however, that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim under section 552.110(a). *See* Open Records Decision No. 402 (1983) (addressing statutory predecessor).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Prometric asserts that specified portions of its proposal constitute trade secrets under section 552.110(a). Having considered these arguments, we conclude that Prometric has presented a *prima facie* case that parts of its proposal constitute trade secrets under section 552.110(a). We have received no arguments that rebut Prometric's trade secret claims as a matter of law. Accordingly, we have marked the portions of Prometric's proposal that the commission must withhold under section 552.110(a). Prometric also argues that information not encompassed by its section 552.110(a) claim is excepted from disclosure under section 552.110(b). We conclude that Prometric has not made the demonstration required by section 552.110(b) that public disclosure of any of this additional information would be likely to cause Prometric any substantial competitive harm. We therefore conclude that none of the additional information at issue is excepted from disclosure under section 552.110(b). *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

PSI contends that portions of its proposal qualify as trade secrets under section 552.110(a). PSI also argues that this same information is excepted from disclosure under section 552.110(b). Having considered these arguments, we conclude that PSI has demonstrated that the commission must withhold most of the information at issue under section 552.110(b). We have marked that information. As we further conclude that PSI has not demonstrated that the remaining information at issue qualifies as a trade secret, or shown that the release of that information would be likely to cause PSI any substantial competitive harm, none of the remaining information at issue is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 509 at 5 (1988), 319 at 3 (1982).

We next note that PSI's proposal contains social security numbers. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in PSI's proposal are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the commission to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security numbers in PSI's proposal were obtained or are maintained under such a law and are therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the social security numbers that we have marked, the commission should ensure that they were not obtained and are not maintained under any provision of law enacted on or after October 1, 1990.

PSI's proposal also contains information that is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with the copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the commission must withhold the marked information that is excepted from disclosure under section 552.110; and (2) the commission may be required to withhold the marked social security numbers under section 552.101 in conjunction with section

405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The commission must release the rest of the submitted information. In doing so, the commission must comply with copyright law in releasing copyrighted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

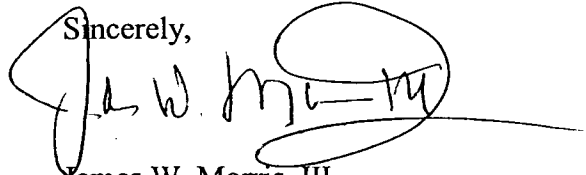
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large loop at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 199614

Enc: Submitted documents

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